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Federal Communications Commission  
Office of the Secretary

October 29, 1991

Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street NW Suite 222  
Washington, D.C. 20554

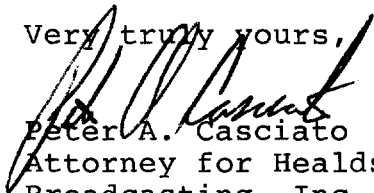
Re: Healdsburg Broadcasting, Inc. ("HBI")  
BPH-910211MB, Applicant for a New FM  
Radio Station on Channel 240A in  
Healdsburg, CA

Dear Ms. Searcy:

Enclosed for filing are an original and four copies  
of HBI's Opposition to Motion to Dismiss.

Should you have any questions concerning HBI,  
please contact the undersigned.

Very truly yours,

  
Peter A. Casciato  
Attorney for Healdsburg  
Broadcasting, Inc.

enclosures

cc: Public File

PAC:sc

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FM EXAMINERS

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OCT 30 1991

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC

Federal Communications Commission  
Office of the Secretary

In re Application of )  
Healdsburg Broadcasting, Inc. )  
 )  
For A Construction Permit )  
For A New FM Station on )  
Channel 240A )  
Healdsburg, California )

File No. BPH-910211MB

To: Chief, Mass Media Bureau

OPPOSITION TO MOTION TO DISMISS OF  
HEALDSBURG BROADCASTING, INC.

Healdsburg Broadcasting, Inc. ("HBI"), by its attorney and  
pursuant to Commission Rule Section 1.45, 47 C.F.R. Section 1.45,  
opposes the Motion to Dismiss of Beckwith Communications, Inc.  
("Beckwith") filed October 18, 1991. As discussed below,  
Beckwith's Opposition to HBI's Petition for Leave to Amend and  
Motion to Dismiss is untimely and procedurally defective.  
Moreover, the substance of its claims misstate HBI's factual  
circumstances and misstates the law. As a result, the Beckwith  
Motion to Dismiss must be dismissed and denied, and HBI's  
Petition for Leave to Amend and Amendment accepted for filing.

A. Beckwith's Motion to Dismiss Is  
Procedurally Defective and Untimely

HBI's Petition For Leave to Amend and Amendment were filed  
September 27, 1991. See Attachment A hereto, a copy of the  
initial page of HBI's Petition, date-stamped by the Secretary's  
office of the Commission. Section 1.45 of the Commission's rules  
requires that any Opposition to such a Petition be filed within  
ten days of its filing. Thus, the Beckwith Opposition and Motion  
were due on October 7, 1991. Instead, Beckwith filed 11 days

late. Thus, its pleading must be dismissed.<sup>1</sup> A second procedural ground for dismissal of Beckwith's pleading is that it improperly joined two separate actions in one pleading. Section 1.44(c) & (d) of the Commission's rules specifically directs that requests requiring action by the delegated authority "not be combined" and that such "pleadings which combine requests . . . be returned without consideration." Thus, for this second reason, the Beckwith Opposition/Motion cannot be entertained.

B. HBI's Amendment Corrects A Calculation Error, Reportable Under Section 1.65 of the Rules, That Does Not Render HBI's Application Unacceptable For Tender

The entire disingenuous argument of Beckwith proceeds from the inaccurate premise appearing at page 2, paragraph 2 of its Opposition:

2. Section V-B of Healdsburg's [HBI] application incorrectly calculated the 60 and 70 dBu contours because it assumed an incorrect Height Above Average Terrain ("HAAT"). (emphasis supplied)

HBI did nothing of the sort. As the September 6, 1991 engineering statement of Stephen C. Petersen, P.E. clearly states, Mr. Petersen, when drafting the engineering section of HBI's application, made a calculation error by incorrectly substituting HBI's Height Above Mean Sea Level of 509 meters (the correct and unchanged response to Section V-B Question 7(b)(2) of HBI's application, as filed) for the Height of Radiation Center

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<sup>1</sup> HBI's Petition and Amendment appeared on Public Notice on October 7, 1991. Thus, even if the Public Notice were the operative date, Beckwith's filing still would have been filed one day late.

Above Average Terrain, 339 meters (the correct and unchanged response to Section V-B Question 7(b)(3) of HBI's application, as filed). Thus, HBI's engineer did not assume an incorrect HAAT; rather, he miscalculated it from the correct data available in HBI's application, as filed. Indeed, Beckwith's engineer, Thomas G. Adcock, does not state that HBI's engineer incorrectly assumed anything, only that HBI "used" a lower radiation center height "in calculating the 60 & 70 dBu contours for its proposed facilities." See Affidavit of Thomas G. Adcock attached to Beckwith Motion to Dismiss at p. 1.

The distinction between "assumption" and "miscalculation" is no small matter under Commission "hard look" processing guidelines. See Report and Order Related To Processing of FM and TV Applications MM Docket No. 84-750, 50 FR 19936 (1985), 58 P&F 2d 776, recon. denied, 50 FR 43157 (1985) & Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Otherwise Defective ("New Processing Report & Order") 50 FR 19445, 58 P&F 2d 166 (1985). In the New Processing Report & Order, the Commission plainly indicates that HBI's voluntary disclosure of this calculation error -- after its discovery -- is harmless as it relates to the tenderability, acceptability, and grantability of the HBI application. First, at Paragraph 4, the Commission indicates the elements of engineering data that must be present for the Commission to perform an acceptability study, all of which are correctly contained in HBI's application, as filed, except the

miscalculated HAAT. 58 P&F 2d 167-168. The New Processing Report & Order then goes on to state

[i]f any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, that application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender.

Id. at 169.

As stated previously, HBI filed its Petition for Leave to Amend and Amendment because its engineer had found a calculation error during the process of certifying the beta version of a new computer program developed to prevent such errors. See Petersen Engineering Statement at pp. 1-2, attached to HBI's Petition for Leave to Amend and Amendment. As that Statement indicates, the actual antenna location, maximum ERP of 480`watts, geographic location of HBI's transmitter site and antenna type and manufacture (among other things) remain unchanged in the application as originally filed. What does change is the HAAT which can be determined "confidently and reliably" -- indeed, with certainty -- from the unchanged correct Height Radiation Center Above Average Terrain and Height Above Mean Sea Level in the HBI application. Thus, the HBI application is acceptable for tender and filing under the New Processing Report & Order.

Undeterred by the plain language of the New Processing

Report & Order, Beckwith also seeks to disingenuously make the HBI calculation error a violation of the "go/no go" proposition of the Commission's short spacing rules. Again, Beckwith miscites those rules and the Amendment of Part 73 of the Commission's Rules To Permit Short-Spaced FM Station Assignments By Using Directional Antennas ("Directional Antennas Report & Order"), 65 P&F 2d 1651 (1989). There, the Commission explicitly made a change in its rules to allow the use of directional antennas and to permit short-spacing of up to 8 kilometers (about 5 miles). Id. at para. 48, p. 1660. See also Section 73.215 of the Commission's rules. HBI's application as filed contained a proposed short-spaced site consistent with the information requested in the Form 301 application and the revised Commission rules under the Directional Antennas Report & Order. Its instant Amendment merely confirms that it continues to meet those requirements. Thus, there is not now, nor has there ever been, a violation by HBI of the Commission's go/no go standards or the "hard look" processing guidelines. Indeed, the Commission issued a companion Public Notice, Processing of FM Applications Pursuant to MM Docket 87-121 Tenderability Requirement, that same date (65 P&F 2d 1663), which included the permissible 8 kilometer short spacing standard, which HBI followed. See HBI Application Section V-B, Response to Question 13.

- C. HBI's Petition For Leave To Amend And Amendment Meet The Good Cause Requirements For Filing, If Applicable Here

Desperate for a case to buttress its position, Beckwith

cites Naguabo Broadcasting Co., 68 P&F 2d 1325 (Rev. Bd. 1991) for the proposition that HBI cannot meet the good cause test for amending its application, if applicable to its Petition For Leave to Amend. This case is wholly irrelevant to HBI's circumstances. In Naguabo, the applicants requested short-spaced sites when filing applicatios in 1986 and were required to submit waiver requests for their sites and meet the criteria for grant of such waivers because the Commission had yet to adopt its 1989 Directional Antennas Report & Order. Moreover, the specific applicant contested in Naguabo, one Negroni, attempted to replot his transmitter site four years after filing his application and using a Petition To Reopen the Record after hearing as his vehicle.

In contrast, under that Directional Antennas Report & Order, HBI was under no duty to submit a waiver request or meet the former criteria because that Report & Order the Commission's Public Notice set forth the process to be followed if the short-spacing request was 8 kilometers or less.<sup>2</sup> Second, the substantive issue in Naguabo concerned an applicant's failure to place a 70 dBu signal within the borders of the community of license. In no way does Beckwith claim, let alone can it be asserted, that HBI does not propose to place a 70 dBu signal over

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<sup>2</sup> Thus, Beckwith's citation to Goodlettsville Broadcasting, Inc. 66 P&F 2d 146 (Rev. Bd 1989); Saxton Steele Communications, 67 P&F 2d 355 (Rev. Bd. 1989); and Primemedia Broadcasting, Inc., 65 P&F 2d 29 (1988) are all wrong and inapposite to HBI's facts and circumstances, since the facts and circumstances in those cases all arose prior to the effective date of the Directional Antennas Report & Order.

Healdsburg. Thus, Naguabo has no bearing on HBI's Petition and Amendment.

Nonetheless, HBI's Petition and Amendment meet the good cause requirements of Section 73.3522 of the Commission's rules and Erwin O'Connor.<sup>3</sup> HBI acted with due diligence when its engineer discovered his calculation error by bringing this matter to the attention of the Commission, even though HBI's application had already been accepted for filing. Moreover, the proposed amendment was not required by a voluntary act of HBI in that it had a duty under Section 1.65 of the Commission's rules to report and rectify its unforeseen error upon discovery, which it promptly did.

Finally, no other party to this proceeding is prejudiced or placed at a comparative disadvantage by HBI's actions. No Hearing Designation Order has issued in this proceeding. Under the New Processing Report & Order, if the calculation error in HBI's engineering had not been found or reported to the Commission by HBI, but instead found by the Commission's staff when reviewing the five mutually exclusive applicants in this proceeding, an appropriate issue would have been designated in the Hearing Designation Order, or a post-hearing designation amendment required. See 58 P&F 2d 169. In this case, HBI has obviated the need for either specification of an issue or amendment after issuance of a Hearing Designation Order, by dutifully providing the corrected information after the discovery

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<sup>3</sup> 22 FCC 2d 140 (Rev. Bd. 1970)



of its engineer's calculation error. It should be noted that correcting its calculation error allowed HBI to show its population coverage to be 90,301 persons rather than 84,399 persons. However, the fact remains that HBI does not gain a comparative advantage because all of the other applicants propose a different transmitter site which provides each of them a claim of coverage of at least 145,000 persons. See e.g. Beckwith's application, response to Section V-B Question 17.<sup>4</sup> Thus, even with the "increase" which if the calculation error had not been made was actually not an increase but the actual coverage to which HBI was entitled to engineer and claim credit for, no other applicant has been harmed comparatively by HBI's correcting its calculation error.

Beckwith has cited no case that is pertinent to HBI's facts or circumstances. Indeed, the cases cited by Beckwith relate to applications with problems that cannot be reliably ascertained from the information contained within the confines of those applications, as filed. Moreover, all of the cases cited by Beckwith deal with applicants whose applications had not been accepted for filing and which were attempting to have them

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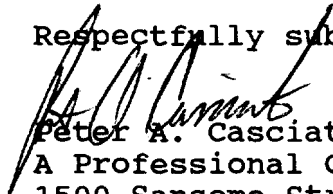
<sup>4</sup> Other applicants claim coverage even in access of Beckwith. See e.g. Dragonfly Communications, Inc. (BPH-910211MA): population of 209,393; Desert Rock Limited Partnership (BPH-910211ML): population of 159,611; Deas Broadcasting, Inc. (BPH-910208MB): population of 174,579; Empire Broadcasting, Inc. (BPH-910212MM): population of 170,125.

reinstated nunc pro tunc.<sup>5</sup> A case which Beckwith does not cite but which supports HBI is Warren Price Communications, Inc. DA87-800 2 FCC Rcd 4201 (Mass Media Bureau 1987). There, Community, one of the applicants, filed an amendment correcting its HAAT which had been incorrectly calculated. The Commission accepted the amendment because, as HBI has demonstrated in its Amendment, "all data correlate and cross-check with the sole exception of the HAAT derived from Section V-B Item 15." See para. 7. Admittedly, HBI did not discover its calculation error until after the 30-day curative amendment period had run in this proceeding. Nevertheless, HBI has promptly brought it and its correction to the Commission's attention upon discovery of the calculation error via its Petition For Leave to Amend and Amendment.

#### CONCLUSION

For all of the foregoing reasons, HBI's Amendment and Petition For Leave To Amend should be accepted under Section 1.65 of the Commission's rules and Beckwith's Motion to Dismiss and Opposition should be dismissed and denied.

Respectfully submitted,

  
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(415) 291-8661

Attorney for  
Healdsburg Broadcasting, Inc.

October 29, 1991

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<sup>5</sup> On May 1, 1991, the Commission issued its "Notice of Acceptance For Filing of FM Broadcast Applications and Notice of Petition To Deny Deadline," Report NA-146, listing HBI's application as accepted for filing. No Petition to Deny was filed against the HBI application.

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC

In re Application of	)	
Healdsburg Broadcasting, Inc.	)	
	)	File No. BPH-910211MB
For A Construction Permit	)	
For A New FM Station on	)	
Channel 240A	)	
Healdsburg, California	)	

To: Chief, Mass Media Bureau

PETITION FOR LEAVE TO AMEND

Healdsburg Broadcasting, Inc., applicant for a new FM radio station on channel 240A in Healdsburg, California, by its attorney, hereby petitions for leave to amend its application pursuant to Section 1.65 of the Commission's Rules.

The attached Amendment, reports a calculation error in the Section V-B engineering portion of the application by which applicant's engineer calculated the distance contours incorrectly using the Height of Radiation Center Above Average Terrain instead of the Height Above Mean Sea Level. Using the latter correct figure enlarges pertinent contours and requires modification of the applicant's directional antenna to limit radiation towards KKHI-FM to protect it for a short-spaced requirement of 8 kilometers in accordance with Sections 73.207 and 73.215 of the Commission's rules.

Applicant respectfully requests that it be granted leave to file the attached amendment to comply with Section 1.65 of the

CERTIFICATE OF SERVICE

I, Peter A. Casciato, certify that the following is true and correct:

I am employed in the City and County of San Francisco, California, am over the age of eighteen years, and am not a party to the within entitled action:

My business address is: 1500 Sansome Street, Suite 201, San Francisco, California 94111.

On October 29, 1991, I served the attached Opposition to Motion to Dismiss of Healdsburg Broadcasting, Inc. by causing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, to be placed in the United States Post Office mail box at San Francisco, California, addressed as follows:

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Broadcast Facilities Division  
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